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*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
*Washington, D.C. 20554*

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In the matters of )  
Application of )  
CAPITOL RADIOTELEPHONE, INC. )  
d/b/a CAPITOL PAGING )  
For a Private Carrier Paging )  
Facility on 152.480 MHz in )  
Huntington/Charleston, WV )  
Imposition of Forfeiture re )  
CAPITOL RADIOTELEPHONE, INC. )  
d/b/a CAPITOL PAGING )  
Former Licensee of Station )  
WNSX646 in the PLMRS )  
Revocation of Licenses of )  
CAPITOL RADIO TELEPHONE, INC. )  
d/b/a CAPITOL PAGING )  
Licensee of Stations WNDA400 )  
and WNWW636 in the PLMRS )  
Revocation of Licenses of )  
CAPITOL RADIOTELEPHONE COMPA- )  
NY, INC. d/b/a CAPITOL PAGING )  
Licensee of Stations KWU373, )  
KUS223, KQD614 and KWU204 in )  
the PMRS )

PR Docket No. 93-231

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To: The Commission, *en banc*

APPLICATION FOR REVIEW

CAPITOL RADIOTELEPHONE COMPANY, INC. (a/k/a Capitol Radio-  
telephone, Inc. or Capitol Radio Telephone, Inc.) d/b/a CAPITOL  
PAGING ("Capitol"), by its attorney, respectfully makes applica-  
tion to the Federal Communications Commission for review of the

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final decision of the Review Board in the captioned proceeding, FCC 96R-1, adopted February 9, 1996 and released February 23, 1996 (the "RBD"). Upon review, the Commission should reinstate in all respects the Initial Decision (the "ID") of Judge Chachkin in this proceeding, 9 FCC Rcd 6370 (ALJ 1994). In support of its Application for Review, Capitol respectfully states:

This revocation case was brought by the Private Radio Bureau (PRB) as a landmark enforcement case intended to "send a public signal" to the paging industry that the Commission "will not tolerate" the type of anticompetitive conduct PRB accused Capitol of engaging in against RAM Technologies, Inc. (RAM). In substance, PRB accused Capitol of establishing a private carrier paging station on 152.48 MHz as a fighting ship to cause interference to RAM's paging operations on that same channel, and to drive RAM's customers off of its system and on to Capitol's.

Precisely contrary to PRB's premise in bringing the case, the evidence at the hearing clearly exonerated Capitol of all charges of serious misconduct -- most especially the charge of anticompetitive conduct by Capitol -- and Judge Chachkin meticulously so found. Additionally, the evidence at the hearing clearly demonstrated, and Judge Chachkin meticulously so found, that the true basis for RAM's complaints against Capitol in the first place (which largely precipitated PRB's actions against Capitol) was actually a calculated campaign by RAM to prevent Capitol from getting a license on 152.48 MHz initially, and to drive it off the frequency once licensed. Judge Chachkin further

found that RAM's purpose in doing so was to avoid sharing the channel with Capitol, notwithstanding that RAM was required by the Commission's rules to do so.

On exceptions filed only by PRB, the Review Board substantially affirmed Judge Chachkin's ID, but modified it in certain important respects. Specifically, although the Review Board upheld Judge Chachkin's findings that there is no basis for revocation of Capitol's licenses, it concluded, based on its *de novo* findings of fact, that a forfeiture of \$6,000 should be imposed against Capitol for violation of certain Part 90 operating rules during the period the FOB conducted a field inspection of Capitol's station. Additionally, the Review Board, "on [its] own motion," struck from the ID the adverse findings and conclusions relating to RAM Technologies, Inc., on the ground that RAM's "licenses have not been designated for hearing" and that "no issues were specified against" RAM. (RBD at ¶1).

To the extent the Review Board granted any of PRB's exceptions relating to possible violations of rules by Capitol, the Review Board's *de novo* findings and conclusions are not supported by substantial evidence in the record as a whole and are otherwise arbitrary and capricious.<sup>1</sup> Review by the Commission is thus

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<sup>1</sup> The errors in PRB's exceptions and, hence, the principal errors in the Review Board's decision, are illuminated to a certain extent in Capitol Radiotelephone Company, Inc. Reply to Exceptions of Private Radio Bureau, PR Docket No. 93-231, December 14, 1994. However, the 10 pages permitted in this Application for Review are wholly inadequate to brief these issues, and Capitol therefore requests that a full 25-page briefing be permitted upon grant of this Application for Review.

warranted on that basis alone. See 47 C.F.R. §1.115(b)(5)(i), (iii). Moreover, striking the adverse findings and conclusions concerning RAM Technologies, Inc. from the ID not only constituted error as a matter of evidentiary law by the Review Board, which *inter alia*, conflicts with Commission policy, but also raises an important issue of Commission policy which warrants Commission review. See 47 C.F.R. §1.115(b)(5)(iv), (v).

This landmark revocation case was initiated against Capitol largely because of repeated complaints by RAM Technologies that Capitol applied for and operated its PCP station on 152.48 MHz merely as an anticompetitive fighting ship against RAM's co-channel paging system. At the Commission's agenda meeting on August 3, 1993, when the Hearing Designation Order was adopted, Bureau Chief Haller introduced the item to the Commission in the following terms:

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As an example, Capitol points out that Witness Peters, who reviewed the inspectors' report (PRB Exhibit 3) and other prehearing discovery adduced by the Bureau as preparation for his own prepared testimony (Exhibit CAP-23), and who was also present at the hearing for the testimony of Witnesses Walker and Bogert concerning the results of their field monitoring of Capitol, was both emphatic and categorical in his opinion that Capitol did not engage in excessive testing. *E.g.*, Tr. 1125-1127, 1130, 1142-1143, 1179-1180. (This evidence came out as a result of cross-examination by counsel for RAM). Since Witness Peters was aware of all of the same evidence in the case as Witness Walker, there is no proper basis for the Review Board to nitpick the scope of Witness Peters' opinion or to conclude that Witnesses Walker or Bogert were in a superior position to evaluate the nature of Capitol's testing. Moreover, the Review Board arbitrarily ignored Judge Chachkin's finding that no forfeiture would be warranted in any event, even assuming *arguendo* that Capitol engaged in excessive testing. ID at ¶97 & n. 28.

BUREAU CHIEF HALLER: The Bureau rarely brings enforcement cases to you and then generally not in an open meeting. I think by virtue of the fact we're here in an open meeting, it indicates the gravity of the facts before us in this case. We have an apparent lack of candor and an apparent intentional interference for anticompetitive reasons here. \* \* \* \* \*

*Transcription from Videotape of FCC Open Meeting, August 3, 1993.*

Mr. Haller then turned the meeting over to PRB staff member Borkowski, who outlined for the Commissioners the Bureau's view of the facts in the case and concluded as follows:

MR. BORKOWSKI: It thus appears to us that Capitol obtained its private carrier paging license solely to disrupt RAM's private carrier paging business and drive RAM's customers to Capitol's common carrier paging system.

*Id.* (Emphasis added).

The landmark nature of the case was further underscored by Commissioner Duggan and Chairman Quello in their colloquies after presentation of the item by staff:

COMMISSIONER DUGGAN: Mr. Haller, I take it that the reason for scheduling this matter for an open agenda meeting at the FCC is to send -- at least in part to send a public signal to the other licensees that this Commission will not tolerate such shenanigans. Is that correct?

BUREAU CHIEF HALLER: That is correct, Commissioner. \* \* \* \* \* [T]he facts in this case are serious enough that we do want in fact to make that statement we will not tolerate such actions.

\* \* \* \* \*

COMMISSIONER DUGGAN: Well, I hope we will take a very hard line, and I hope you know that you have the support of all the Commissioners in deterring and rooting out this kind of behavior.

\* \* \* \* \*

CHAIRMAN QUELLO: Certainly, this will be a warning to all licensees that we intend to deal harshly with licensees who use their facilities to cause interference and advance anticompetitive goals. And so I hope this will act as a deterrent to the others and a warning.

*Id.*

What the evidence at the hearing actually showed, however, and what Judge Chachkin found in the ID, is that PRB's charges of anticompetitive misconduct were levelled at the wrong party. Rather than being the perpetrator of anticompetitive misconduct against RAM, the hearing showed, and Judge Chachkin meticulously found, that Capitol actually was the victim of a relentless anticompetitive campaign by RAM to prevent Capitol from getting a license for 152.48 MHz, if possible, and, if not possible, to drive Capitol off of the channel. Judge Chachkin further found that RAM's incentive for doing so was to evade its legal responsibility to share 152.48 MHz with Capitol.

Purely as a matter of evidentiary law, the Review Board's exclusion of these findings and conclusions conflicted with Commission policy and was otherwise erroneous and arbitrary. As Judge Chachkin correctly found, RAM's hidden agenda (i.e., its calculated anticompetitive campaign against Capitol), goes directly to the issue of bias -- hence credibility (which findings the Review Board otherwise affirmed) -- on the part of the RAM officers and employees that testified against Capitol at the

hearing.<sup>2</sup> Moreover, in defending against PRB's charges that Capitol engaged in anticompetitive conduct against RAM, Capitol is clearly entitled as part of its defense to prove an alternate theory, i.e., that Capitol actually was the *victim* of anticompetitive conduct, not the *perpetrator*.<sup>3</sup>

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<sup>2</sup> In substance, what the record shows (which the Review Board does not and cannot dispute), is that RAM launched a "paper war" at the Commission against Capitol (i.e., abused the Commission's processes), and that RAM cynically and repeatedly violated the Commission's rules as part of RAM's campaign against Capitol. ID at ¶24 (disabling monitor receiver in order to "walk" over Capitol's pages), ¶41 (installing time out device in order to "walk" over co-channel transmissions after two minutes, knowing that doing so is unlawful), ¶61 (launching a "paper war" at the Commission against Capitol, i.e., abusing the Commission's processes). The Commission has explicitly acknowledged that such conduct reflects on the "truthfulness" and "reliability" of the party engaging in it. *Character Qualifications*, 102 F.C.C.2d 1179, 1209, 1211 (FCC 1986).

<sup>3</sup> The Review Board's companion assertion that "the record is devoid of any indicia to support" Judge Chachkin's adverse findings concerning RAM is both clearly erroneous and puzzling. Capitol introduced substantial testimonial and documentary evidence supporting Judge Chachkin's findings and conclusions. See, e.g., Exhibits CAP-01, pp. 3, 6-14,; CAP-02; CAP-03; CAP-04; CAP-5; CAP-06; CAP-07; CAP-09; CAP-18; CAP-23. All of this evidence was prefiled before the hearing, and both PRB and RAM had ample notice of the contention and opportunity to rebut (which they did not do). Additional evidence was adduced in the form of admissions at the hearing by RAM personnel. Judge Chachkin also carefully cited to the record to support his adverse findings, which the Review Board arbitrarily ignored. The only item even acknowledged by the Review Board was the ID's use of the Basham Declaration included in CAP-12, which does not in any event derogate from the meticulous documentation in Judge Chachkin's decision. Moreover, contrary to the Review Board's ruling, the ID merely used it to demonstrate state of mind, which is entirely proper (see Capitol Reply Brief at p. 22, December 14, 1994); and it was also corroborated by Exhibit CAP-18, p. 21, which the Review Board did not acknowledge. The Review Board's finding is thus contrary to the uncontradicted evidence of record and is erroneous.

Perhaps more importantly is that the Review Board's decision plainly loses sight of the forest because of the trees in this case. PRB brought this revocation case against Capitol, not because of some excessive testing or morse code violations by Capitol warranting a \$6,000 forfeiture,<sup>4</sup> but rather because PRB sought to show that Capitol was engaged in serious anticompetitive misconduct against RAM sufficient for revocation of all of Capitol's private radio and common carrier paging licenses.

However, the evidence as analyzed by Judge Chachkin wholly exonerated Capitol from these serious charges; and even the Review Board's decision acknowledges, as it must, that the hearing showed them to be utterly without foundation *other than* RAM's allegations. Judge Chachkin further found, in turn, that RAM's allegations against Capitol actually were part of an anticompetitive campaign to keep from sharing 152.48 MHz with Capitol, notwithstanding that it was legally required to do so. In such circumstances, it seems evident that the Commission properly should be just as indignant that RAM has perpetrated what amounts to a fraud on the Commission's processes, as it was when informed that Capitol allegedly was engaged in anticompetitive conduct against RAM.

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<sup>4</sup> Capitol does not minimize the seriousness of any violations of the Commission's rules, including excessive testing and the speed of morse code call sign identifications. As a full briefing will show, however, the Review Board's findings on these issues also are erroneous.



Stated somewhat differently, that RAM engaged in an anti-competitive campaign against Capitol is just as much an adverse reflection on RAM's character qualifications to be a Commission licensee, as the alleged conduct by Capitol against RAM (which turns out to not have occurred) was sufficient to cause the Commission to initiate revocation proceedings against Capitol in this case. Indeed, Capitol has recently made this point repeatedly in seeking denial of certain licenses sought by RAM,<sup>5</sup> and those cases remain pending before the Commission. Under all of these circumstances, Capitol respectfully submits that the landmark character of the case itself warrants full review and action by the Commission.

WHEREFORE, Capitol Radiotelephone Company, Inc. respectfully prays that the Federal Communications Commission review the decision of the Review Board in this case, that it order a full briefing on each of the modifications made by the Review Board to the Initial Decision, and that, upon its review, that the Commission reinstate Judge Chachkin's Initial Decision in all respects, and that it take such other and further action against RAM

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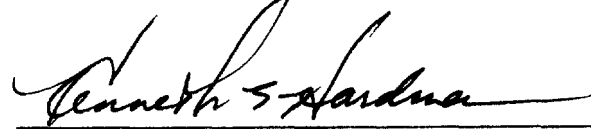
<sup>5</sup> See Application for Review, In re American Mobilphone, Inc. and RAM Technologies, Inc., File No. 23792-CD-AL-95 (August 23, 1995) (assignment of KFQ936, et al., to RAM); Petition for Reconsideration and Rescission, In re RAM Technologies, Inc., File No. 9502R48248 (May 17, 1995) (renewal of WNJN621 by RAM); Petition for Reconsideration and Rescission, In re RAM Technologies, Inc., File No. R41680 (April 5, 1995) (renewal of WNQV776 by RAM).

Technologies, Inc. as warranted by the facts found by Judge Chachkin in the Initial Decision.

Respectfully submitted,

CAPITOL RADIOTELEPHONE COMPANY,  
INC. d/b/a CAPITOL PAGING

By:



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March 25, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of March, 1996, served the foregoing Application for Review upon the Wireless Telecommunications Bureau by mailing a true copy to David L. Furth, Esquire and John J. Borkowski, Esquire, 2025 M Street, N.W., Room 7002, Stop Code 2000C, Washington, D.C. 20554, and upon RAM Technologies, Inc. by mailing a true copy thereof to its attorney, Frederick M. Joyce, Esquire, Joyce & Jacobs, 1019 - 19th Street, N.W., 14th Floor, Washington, D.C. 20036.



Kenneth E. Hardman